Supreme Court, U. S.
FILED
OCT 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 64, Orig.

STATE OF NEW HAMPSHIRE,
Plaintiff

v.

STATE OF MAINE,
Defendant

REPORT OF TOM C. CLARK
SPECIAL MASTER

October 8, 1975

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*Although not reproduced here, the Appendices are identified. The Appendices are filed with the Clerk, U. S. Supreme Court.

REPORT OF THE SPECIAL MASTER

No. 64, Orig.

State of New Hampshire, Plaintiff, *v.* State of Maine.	On Bill of Complaint.

[October 8, 1975]

Mr. Justice Clark.

This case was brought under the original jurisdiction of the Supreme Court [1] by the State of New Hampshire to fix the location of the lateral marine boundary between it and the State of Maine in the area of the Atlantic Ocean lying between the mouth of Portsmouth Harbor and the entrance to Gosport Harbor in the Isles of Shoals. A motion for leave to file a complaint against the State of Maine was filed with the Supreme Court on June 6, 1973, and was granted on October 9, 1973. 414 U. S. 810. The matter was referred for a report of the Special Master on November 5, 1973, 414 U. S. 996. This Report is the result of that referral.

Pretrial proceedings were held in April of 1974 to narrow the issues in preparation for a trial initially scheduled to commence August 12, 1974. Between April and the scheduled trial date, however, the Attorneys General of both States, at the urging of the Special Master, reached a tentative settlement of the dispute. The parties thereupon submitted the results of the negotiations to the Special Master in the

[1] Article III, § 2 of the Constitution provides that: "The judicial Power shall extend . . . to Controversies between two or more States . . . in all Cases . . . in which a State shall be a Party, the supreme Court shall have original Jurisdiction." See 28 U. S. C. § 1251 (a)(1).

form of a motion for entry of judgment by consent of the plaintiff and defendant on September 23, 1974. Three days previously, however, the New Hampshire Commercial Fishermen's Association filed a motion for permission to intervene in the case with the Supreme Court, which was referred to the Special Master. Opposition papers were filed by the States, and following a hearing on December 16, 1974, the motion was denied by the Special Master, to which the Association excepted. At the hearing, the Association was permitted to proceed as *amici curiae* and since that time it has done so, filing briefs on the legal and factual matters at issue in this dispute, as have both of the States.

On February 27, 1975, a Stipulation Regarding Record was filed by the States which incorporated in the Record "for decision of this action" the following items: (1) "Summary Memorandum on Lateral Maritime Boundary between the State of Maine and the State of New Hampshire" by Professor William S. Barnes; (2) "Memorandum on the Mouth of the Piscataqua River" by Dr. Carl Bowin; (3) a copy of Chart No. 211, Cape Neddick Harbor to Isles of Shoals, by the U. S. Coast and Geodetic Survey, 8th Edition; (4) two U. S. Geological Survey Maps, "Kittery, Me.—N. H. Quadrangle" (1956 ed.; phot.-revised 1973), and "Isles of Shoals, Me.—N. H. Quadrangle" (1956 edition); (5) all statements in the pleadings, briefs, memoranda and pretrial submissions" which have not been denied or controverted"; and (6) a copy of the King's Order in Council of April 9, 1740, setting the boundary between the Provinces of New Hampshire and Massachusetts Bay. It was agreed, further, that judicial knowledge may be taken of "all official maps, the published state papers of either State including maps incorporated therein, works of history of apparent authenticity and repute, government publications both federal and state, and ancient historical documents and maps if in published form and apparently authentic." In addition, the

parties agreed that, if a hypothetical boundary line was drawn from the mouth of the Piscataqua Harbor across the sea to the mouth of the Gosport Harbor (Isles of Shoals), strictly in accordance with the "equidistant principle," see Art. 12, Geneva Convention of the Territorial Sea and Continuous Zone (1958), excluding all reference to "special circumstances," the line would be "a zigzag line changing course at least 4 times and . . . extremely inconvenient and unworkable."

Upon the filing of final briefs, the proposed consent decree as well as the case as a whole was taken under submission on March 17, 1975, without argument. The Special Master has concluded that the proposed consent decree should be submitted to the Court for its consideration. The Special Master has concluded, however, that under *Vermont* v. *New York*, 417 U. S. 270 (1974), the proposed decree must be rejected because it constitutes "mere settlements by the parties acting under compulsions and motives that have no relation to performance of [the Court's] Article III functions." *Id.*, at 277. It is true, and the Special Master finds, that a case or controversy did exist at the time of the filing of the suit. The matter, however, was settled and compromised, perhaps because of the practical difficulties attendant upon enactment of an interstate compact under Art. I, § 10, cl. 3, of the Constitution or because of the political uncertainties of relying on a mere executive agreement settling the dispute.[2] At this point in time, however, the moving papers do not propose a case or controversy in which

[2] In this regard, it should be noted that the New Hampshire Legislature does not support the efforts of the state executive branch. The legislature adopted House Concurrent Resolution No. 4 by substantial majorities in both Houses early in 1975. Though apparently lacking the force of law (see New Hampshire Constitution, Part Second, Articles 44 and 45), the resolution expresses the legislature's support of a marine boundary line substantially different from that in the proposed consent decree and endorses the position of the *amici curiae* in this case opposing the tentative settlement.

the Court might apply "principles of law or equity to facts, distilled by hearings or stipulations." *Ibid.* The Special Master recommends therefore that the consent decree be rejected. If the Court concludes that the Special Master is in error in this regard, then the consent decree should be entered.

In the event the Court decides that the proposed consent decree cannot be entered, the dispute submitted to the Court and referred by it to the Special Master can be resolved on the stipulated record now before the Special Master, without further evidentiary hearings.[3] Accordingly, the Special Master recommends that the

[3] It is not at all strange that no additional evidentiary proceedings are deemed necesary. No two boundary delimitation proceedings can ever be alike, and, as will be pointed out in the text below, the circumstances of this dispute are relatively clear and its solution is simple. It has none of the singularities, for example, that marked the Michigan-Wisconsin boundary case earlier this century, 270 U. S. 295 (1926): 295 U. S. 455 (1935), and called forth exertions of the Special Master there which were admiringly described as follows:

"The Special Master, accompanied by counsel for Michigan and for Wisconsin, went in a large boat to the boundary sites claimed by Michigan and by Wisconsin. In various ports . . . , he took the testimony of fishermen who had received the questionnaire [distributed by the parties] and indicated that they were informed concerning the matters in controversy, as well as the testimony of other witnesses admirably selected geographically. . . . You will observe that the whole shore of the disputed waters in Green Bay produced witnesses familiar with all the area under consideration except St. Martin Island where no one lives except four lightkeepers. Legal field work! Would that their were more of it in litigation where geography plays a part!"

Martin, "The Second Wisconsin-Michigan Boundary Case in the Supreme Court of the United States, 1932–1936," 28 Annals of the Assoc. of Am. Geographers 77, 78 (1938).

Here, the parties have stipulated to the making of a record which quite sufficiently provides a basis on which the boundary between the States is easily determinable. Neither the parties in their original pleadings nor *amicus curiae* in its independent submissions have raised issues which require further evidentiary inquiry.

following recommendations and report be adopted and the report's proposed boundary line be established.

1. Background of the Complaint.

The case is known in the press as "the lobster war" and at issue are some 2,500 acres of hard, rocky sea bottom—prime fishing waters for lobsters—located between the Harbors of Portsmouth on the mainland and Gosport on the Isles of Shoals. The controversy may well have been sparked by the continuing decrease in the size of the New England lobster catch in recent years.[4]

Maine prohibits the taking of lobsters or crabs in Maine waters without a license—which is available only to Maine residents, 12 Maine Rev. Stat. Ann. § 4404.[5] In addition, Maine imposes stricter minimum and maximum size requirements than New Hampshire. Compare 12 Maine Rev. Stat. Ann. § 4451 (1) (no less than $3^{3}/_{16}''$) and § 4451 (2) (no greater than $5''$) with New Hampshire Rev. Stat. Ann. 211:27 (no less than $3^{1}/_{8}''$; no maximum size). Other Maine statutes, for example, relative to the permissible number of lobster traps, are also more restrictive than New Hampshire lobstering

[4] It has been noted by one court that:

"[T]he Maine lobster industry is facing an imminent crisis. The uncontroverted record discloses that in recent years a combination of increased fishing pressure and a decline in sea temperature have substantially depleted the supply of lobsters, and that unless fishing pressure is drastically diminished, the supply may in the near future be reduced to the point where it will be impossible to maintain reasonable yields." *Massey* v. *Apollonio*, 387 F. Supp. 373, 376 n. 5 (Me. 1974).

[5] A three-judge district court recently struck down Maine's three-year durational residence requirement for a lobster fishing license as violative of equal protection. *Massey* v. *Apollonio*, 387 F. Supp. 373 (Me. 1974). Since plaintiff was a bona fide Maine resident, the Court, however, did not reach the question of whether the limitation of lobster fishing licenses to Maine residents impinges upon any constitutional rights of nonresidents. 387 F. Supp., at 374 n. 2.

laws, see 12 Maine Rev. Stat. Ann. §§ 4402, 4403, 4454, 4455, 4459, and 4460.

Following an informal executive agreement in 1970, an effort was undertaken in 1971 to settle the boundary dispute through the legislative process, and an interstate boundary commission containing representatives of each State was established, see New Hampshire Session Laws of 1971, c. 429, and Maine Session Laws of 1971, c. 131. Theoretically, the commissioners were to produce boundaries by mutual agreement, submit them to their respective state legislatures for approval, and then forward them to the United States Congress for acceptance as an interstate compact. Unfortunately, after protracted negotiations, the boundary commissioners reached no agreement, and subsequent events took matters out of their hands.

In 1973, there began a series of "border incidents" which appeared to threaten actual violence between the States. On January 18, 1973, a Dover, N. H., lobsterman named Edward Heaphy was arrested by Maine coastal wardens in open water and charged with taking lobsters illegally from Maine waters; he claimed to have been fishing in New Hampshire's portion of the disputed area.[6] Tempers ran high, and on May 23, 1973, another New Hampshire lobsterman, Edward Capone, was arrested by Maine wardens patrolling the disputed area. An effort to seize his boat was forestalled only by the intervention of a district chief of the New Hampshire fish and game department. See Portland (Me.) Press, May 24, 1973, at 1, col. 1. It was reported that, when news of this arrest was conveyed to the Governor of New Hampshire, he interrupted a session of his executive council to announce that "Apparently Maine has declared war on us." See Manchester Union Leader, May 24, 1973, at 10, col. 5. On the night following the arrest of Capone, the State of Maine filed a § 1983 action in Federal District Court seeking to enjoin New Hampshire Governor Thomson from carrying out his "threats" to enforce the lights-on-range line and to "retaliate promptly" if Maine lobstermen fished in the disputed waters. Federal District Court judges from the two States, attending the annual First Circuit Judicial Conference on New Castle Island, N. H., held an immediate, informal hearing on the complaint that night. One judge suggested that the matter was basically a boundary dispute, not a dispute over regulations and not a § 1983 problem. The hearing was adjourned after the parties agreed to a temporary halt in enforcement activities while the States submitted the case to the Supreme Court. Shortly thereafter, Maine moved to dismiss that complaint voluntarily. See *Lund* v. *Thomson*, No. 14–41 (Me., dismissed June 14, 1973). Further boundary negotiations were abandoned.

A bill was pushed through the New Hampshire Legislature claiming a line that took in all of the disputed territory and that swept some 200 miles out to sea. New Hampshire Rev. Stat. Ann. 1:15; New Hampshire Session Laws of 1973, 580. This asserted boundary—known as the "lights on range" line since it is an extension to the mouth of Gosport Harbor of a line connecting Fort Point Light and Whaleback Light within Portsmouth Harbor—represented the extreme of New Hampshire's claims and found support in the apparent custom of New Hampshire lobstermen to navigate to and from Portsmouth Harbor along that line. See U. S. C. & G. S. Chart 211, attached as Appendix A to this report. At its own extreme, the State of Maine in its Answer filed in the Supreme Court relied on a boundary determination by King George II of England in 1740 which they interpreted as a line following the midchannel of Ports-

[6] Heaphy subsequently filed a complaint in the United States District Court for the District of Maine, charging various Maine officials with a violation of 42 U. S. C. § 1981 *et seq.* Application for a temporary restraining order was denied on June 15, 1973. See *Heaphy* v. *Apollonio et al.*, No. 14–44 (Me., filed June 15, 1973). No further proceedings have taken place in this matter.

mouth Harbor and extended seawards until it is intersected at a point about one and one-half miles south of Gunboat Shoal buoy by a straight line following the midchannel of Gosport Harbor and projected in a westerly direction. Comparing Maine's L-shaped line with New Hampshire's "lights on range" line, one notes an area in dispute totalling some 5,000 acres.

Later, in its complaint before the Supreme Court, New Hampshire modified its claim to take into account the 1740 decree and asserted a line drawn between the westerly most tips of Appledore Island and Star Island in Gosport Harbor. Maine, as an alternative position, claimed a line somewhat closer to New Hampshire's. This line—originating in a 1920 map produced by the United States Geological Survey, Maine-New Hampshire/York Quadrangle, No. 4300–W 7030/15—appears as something in the nature of a 160° "dog-leg" connecting the two harbors. The difference between these alternative claims amounts to approximately 3,200 acres of disputed seabed, and it was a compromise of these two positions that the proposed consent decree sought to achieve. Let us now turn to a review of the historical background of the two States for guidance in locating the correct boundaries.

2. Historical Events Affecting the Boundary.

It was on March 3, 1614, that Captain John Smith set sail from a roadstead in the English Channel, bound west for the coast of "New England, a parte of Ameryca." His mind was on whales and gold and copper, but he acknowledged that "If those failed, Fish and Furres was then our refuge." [7] It so happened that Smith got neither, but fish did prove to be the true wealth of New England and fish it is that lies at the heart of this dispute. Smith, however, was a remarkably observant

[7] J. Smith, A Description of New-England (Veazie reprint of the edition of 1616), at 19.

man which led him to draw and publish some of the first maps of the New England coast, maps read eagerly by Sir Ferdinando Gorges, who was to play a central role in the history of that area. Like many cartographers over the next century, Smith drew beautifully but inaccurately, and boundaries based on such maps resemble the later office survey in Texas whose "calls" seldom met on the ground. Theirs was a legacy of imprecision that haunts us today.

Smith, of course was not the first Englishman to tread the shores of New England. Sir John Cabot, a naturalized Venetian who sailed for King Henry VII, is reputed to have sighted the coast of Maine during his second voyage in 1498, though he thought that he had discovered the "territory of the Grand Khan of China." [8] Then came the two failures of John Hawkins in 1567, and the unsuccessful attempt of Sir Humphrey Gilbert to colonize Newfoundland in 1583. For some years thereafter, English efforts were made under the leadership of Sir Walter Raleigh, Gilbert's half brother, whose interest was far to the south of New England.[9]

It remained for two lesser known names to be the first Englishmen to set foot on Maine soil, Bartholomew Gosnold in 1602 and Martin Prinz in 1603. They awakened the interest of four high-ranking Englishmen: Henry Wristhesley, the Earl of Southampton; his son-in-law, Thomas Arundell; Sir Ferdinando Gorges, Commander of the fortifications at Plymouth, England; and Sir John Popham, Lord Chief Justice of England. In 1605, they commissioned George Weymouth to sail to Maine, and he returned with five captive Indians, three of whom he gave to Gorges and the remaining two to the Lord Chief Justice. Gorges was so entranced by their presence that he stated: "This accident must be

[8] H. Burrage, The Beginnings of Colonial Maine (1914), at 5.
[9] L. Hatch, ed. Maine: A History (1919), Vol. I, at 4.

acknowledged the meanes under God of putting on foote, and giving life to all our Plantations."[10]

In the next year, on the application of the Lord Chief Justice and others,[11] the King granted a royal charter to each of two companies, The London Company and the Plymouth Company, awarding them all the territory in North America between present day North Carolina and the southern half of Maine. The London Company was granted territory between the 34th and 41st degrees of latitude north, and the Plymouth Company, which included Popham and Gorges, received the area between the 38th and 45th degrees, providing, however, "[t]hat the plantation and habitation of such of said colonies, as shall plant themselves as aforesaid, shall not be made within one hundred English miles of the other of them that first began to make their plantation aforesaid."[12]

The London Company elected immediately to establish a colony in South Virginia at Jamestown, but the Plym-

[10] J. Baxter, "Memoir of Sir Ferdinando Gorges," Sir Ferdinando Gorges and his Province of Maine (1890), Vol. I, at 68.

[11] Burrage, *supra*, at 51, 55. Burrage adds that:

"Evidently [Popham] saw very clearly the importance of government control in opening to English colonization the vast territory of the new world . . . . Private plantations had not been successful, and Sir John Popham, and those who agreed with him, had good reasons for their belief that public plantations had the best prospect of success. The Popham idea prevailed, and brought to an end private enterprises on the part of English adventurers like Sir John Zouche, who were ready to seize and to hold as much of American territory as they could secure." *Id.*, at 55–56.

Upon Weymouth's return, Zouche had hurriedly contacted the adventurer and, on October 30, 1605, concluded an agreement with Weymouth to lead another expedition back to the New World. The famous Guy Fawkes' gunpowder plot of November 5th, however, threw the country into such an uproar that time slipped away, and Zouche's efforts were pre-empted by the royal charter to Popham's associates in April of 1606. *Id.*, at 53–54.

[12] 7 Thorpe, Federal and State Constitutions (1909), at 3783 *et seq.*

outh Company waited and later mounted an expedition to North Virginia, with two ships, one under Raleigh Gilbert, son of Sir Humphrey, and the other under George Popham, the Lord Chief Justice's nephew. The Gilbert-Popham expedition was unsuccessful and was abandoned in 1608. Gorges commented in this regard, "All our former hopes were frozen to death."[13] Yet hope sprang eternal, and another attempt to colonize by Thomas Dermer was initiated by Gorges and the Plymouth Company in 1620. But it too failed.

The success of The London Company to the south in Jamestown pointed up the Plymouth Company's failures and made it clear to Gorges who was firmly committed to colonization of the New World, that reorganization was called for. Accordingly, Gorges along with Plymouth Company associates, sought from King James a rechartering of their venture, and an enlargement of their powers and rights pertaining thereto, similar to that granted to The London Company in 1609.[14] Notwithstanding the understandable opposition of the latter company which desired to protect its temporary advantage, a new charter, known as the "Great Patent of New England" was issued by the King on November 3, 1620, to the Gorges group which restyled itself the Council of New England. The charter altered the original boundaries of the colony and the area described as follows:

> "[A]ll that Circuit, Continent, Precincts, and Limitts in America, lying and being in Breadth from Fourty Degrees of Northerly Latitude, from the equnoctial [*sic*] Line, to Fourty-eight Degrees of the said Northerly Latitude, and in length by all the Breadth aforesaid throughout the Maine

[13] Gorges, "A Description of New-England," in Baxter, *supra*, vol. II, at 17.

[14] See 7 Thorpe, Federal and State Constitutions (1909), at 3790 *et seq.*

> Land, from Sea to Sea, with all the Seas, Rivers, Islands, Creekes, Inletts, Ports, and Havens, within the Degrees, Precincts, and Limitts of the said Latitude and Longitude, shall be the Limitts, and Bounds, and Precincts of the second [*i. e.*, North] Collony [*sic*]:
>
> "And to the End that the said Territoryes may forever hereafter be more particularly and certainly known and distinguished, our Will and Pleasure is, that same shall from henceforth be nominated, termed, and called by the Name of New-England, in America . . . ." [15]

Moreover, the charter specifically granted to the Council control over "Fishings . . . both within the same Tract of Land upon the Maine, and also within the said Islands and Seas adjoining." [16] And this part of the charter aroused strong opposition in Parliament, not only among the supporters of The London Company, but also among those representing England's fishing industry. This latter group—merchants in Plymouth, Bristol, and other seacoast towns unassociated with the Plymouth Company—had been engaged in a lucrative fishing enterprise off the coast of Maine for some years and, quite rightly, feared the added cost if such a monopoly were granted. Sensitive to the economic interest of their fisherman-constituents—much as the New Hampshire Legislature in the present case—Parliament found yet another issue to consider in its running battle with the Stuart king—a stout asserter of royal prerogatives. In April of 1621, an act was introduced to permit free and open fishing off the coasts of Virginia and New England, and the controversy continued as a major grievance between the monarch and the legislature for more than three years. Twice the House of Commons passed a free fishing bill,

[15] 3 Thorpe, Federal and State Constitutions (1909), at 1829.
[16] *Id.*, at 1834.

but on neither occasion did the House of Lords sustain the measure, and a direct petition to the King for a modification of the patent to the Council of New England was ignored. Nevertheless, Gorges, who had been periodically haled before Sir Edward Coke's grievance committee regarding this matter, felt sufficiently wearied by Parliament's continued efforts to informally promise to refrain from enforcing his fishing monopoly in New England, and, in that way, the issue was peacefully, if not definitively, resolved in the Spring of 1624.[17]

Throughout this period of dispute, it should be emphasized, the Council of New England was making specific grants of land to various individuals and groups in the area of present-day Maine and New Hampshire, though little in the way of colonization was taking place. Among these grants were several of significance [18] but of chief concern to this litigation is a grant of territory between the Merrimac and Kennebec rivers, made to Gorges and Captain John Mason [19] on August 10, 1622. Heartened by the success of the Pilgrim colony at "New Plymouth," and aided by his new partner, Gorges en-

[17] Burrage, *supra*, at 144–159.

[18] Of particular interest was the Council's first patent which amounted to little more than ratification of a *fait accompli:* the founding of the "Pilgrim" colony by those who had voyaged in the Mayflower in 1620. This group, which had originally obtained a grant of territory at the mouth of the Hudson River from the London Company, were led off course, perhaps at the instigation of Gorges, see Baxter, *supra*, vol. II, at 47 n. 340 and settled within the territorial limits of the Council. Baxter, *supra*, vol. I, at 112–113. On June 1, 1621, the Council for New England, eager to acquire such pious and hardworking colonists, promptly issued a patent to "John Pierce and his associates." *Id.*, at 120.

[19] Mason had spent several years as Governor of Newfoundland, see generally J. Dean, ed. Captain John Mason (1887), and on his return to England "was naturally the subject of attention from persons desirous to profit by his experience." Baxter, *supra*, vol. I, at 123. He met Gorges who quickly found in him "a promising helper, a man of sound judgment and full of energy." *Id.*, at 124.

deavored once again to launch a permanent trading colony and to recoup finally on his years of investment and effort. Towards this end, the council granted territory to Gorges and Mason, which they intended to call the Province of Maine, as follows:

> "[A]ll that pa[r]t of the main land in New-England lying upon the sea-coast betwixt ye rivers of Merrimack and Sagadahock [*i. e.*, Kennebec], and to the furthest heads of the said rivers, and soe forwards up into the land westward until three-score miles be finished from ye first entrance of the aforesaid rivers, and halfway over; that is to say, to the midst of the said two rivers wch bounds and limitts the land aforesaid together with all the lands and isletts within five leagues distance of ye premises and abutting upon ye same or any part or parcell thereof." [20]

Roughly halfway between the Merrimack and Kennebec Rivers named in this grant to Gorges and Mason is the Piscataqua (or Passataquack) River, once described by Captain John Smith as a convenient harbor "for small barks." [21] Along that river—on the site now known as Odiorne's Point—a Scotsman named David Thompson (or Thomson) established in the Spring of 1623 the first important settlement in the presently disputed area. The histories are in agreement as to the location of his settlement on Odiorne's Point and uniformly characterize it as being at the mouth of the Piscataqua.[22] Although Thompson eventually left this site and resettled on a small island in Boston harbor, the large stone house that

[20] 3 Thorpe, Federal and State Constitution (1909), at 1622–1623.

[21] J. Smith, A Descripton of New England (Veazie reprint, 1865), at 43.

[22] See J. Belknap, The History of New Hampshire (1831), Vol. I, at 4; J. Jenness, Notes on the First Planting of New Hampshire (1878), at 4; Baxter, *supra*, vol. I, at 153–154; Burrage, supra, at 169.

he built continued to be used by agents of Gorges and Mason for some years thereafter.[23] Poltical events in England, however, conspired to deny historical significance and success to Gorges' efforts at colonization.

As was mentioned before, Parliament considered the grant of New England from the Council at Plymouth as a public grievance, and consequently the interest of many possible investors had been chilled. To make matters worse, the crown cooled markedly towards development of New England as a result of Prince Charles' romance with Henrietta, a sister of the King of France, who had rival interests in American territory.[24] Within a matter of weeks following the death of James I on March 27, 1625, Charles married the French princess, and a peculiar two-year period of detente with France followed.[25] It was short-lived, however, and, as hostilities between the countries resumed, settlement of the New World was

[23] Belknap, *supra*, at 5–6; Jenness, *supra*, at 6–7. For example, Captain Christopher Levett, sent by Gorges and Mason in late 1623 to make another attempt at colonization, landed at Odiorne's Point and stayed for about a month before passing on up the coast. Levett left a record of his explorations, included this comment on the Isle of Shoals, which he identified as the first place he set foot upon in New England:

"Upon these islands, I neither could see one good timber tree, nor so much good ground as to make a garden." J. Baxter, Christopher Levett of York (1893), at 89.

[24] Prince Charles, in fastening upon Henrietta, abruptly left off his wooing of the daughter of Philip III, the King of Spain, thus precipitating once again a state of hostility between England and Spain, which itself distracted Gorges who was still Commander of the fortifications at Plymouth. Baxter, *supra*, vol. I, at 133–135.

[25] One bizarre episode in the summer of 1625 during this period of family alliance was England's provision of a fleet to help the French King subdue the Protestant defenders of Rochelle. One of Gorges' merchant ships was armed and ordered to aid in this activity, but he eventually withdrew from the operation in part out of distaste for the mission and in part because the French refused to pledge security for the value of his ship. Baxter, *supra*, vol. I, at 137–144.

again encouraged.[26] Grants by the Plymouth Council to individuals or small groups of potential colonists began to multiply, but with little attention to the problems of overlapping boundaries, unfortunately. One of the most important of these was to a group led by Sir Henry Roswell "to afford an asylum for persons who were under a ban for nonconformity" [27] in the so-called Massachusetts Bay area.

On March 19, 1628, the Council granted the land between the Merrimack and Charles Rivers to the Massachusetts Bay Company, and this grant was independently confirmed by royal charter on March 4, 1629.[28] Though little significance was attached to that event at the time, Gorges' extensive possessions would eventually be swallowed by this vigorous corporation, for Gorges was strongly royalist in an era when destiny was running in the opposite direction. In 1629, however, that denouement was still a score of years away, and one step—indispensible to the present dispute—had yet to be taken.

In the latter part of 1629, with the war against France and Spain ended, Gorges and Mason turned their attention back to their colonial enterprises. Their first step was to divide in half the Province of Maine, which had been granted them in 1622, along the Piscataqua River. This was accomplished by the issuance of a new grant

[26] On February 11, 1628, Charles I issued a proclamation which emphasized the importance of protecting English interests on the coast of New England from "foreign enemies" and the discouragement faced by many adventurers, and which made the remarkable suggestion that collection be taken at the churches to support such activities. Burrage, *supra*, at 191–194. The existence of this document attests the impasse reached by King and Parliament in this running battle, since the latter would not vote funds for any of former's projects.

[27] Baxter, *supra*, vol. I, at 147.

[28] 3 Thorpe, Federal and State Constitutions (1909), at 1846 *et seq.*

from the council at Plymouth to Mason of the following territory, which he chose to call New Hampshire:

> "All that part of the Maine land in New England lying upon the sea Coaste beginning from the Middle part of Merrimack River and from thence to proceed Northwards along the Sea coaste to passcattaway [*sic*] river and from thence Northwestwards untill Threescore miles be finished from the first entrance of passcattaway river and also from Merrimacke through the said River . . . together with all Islands and Isletts within five leagues distance of the premises and abutting upon the same or any parte or parcell thereof." [29]

To Gorges was left the remainder of the original 1622 grant, which continued to be known as the Province of Maine.[30] But the hopes of both Mason and Gorges—neither of whom ever saw their possessions—were to go for naught as the practicalities of administering far-off territories caught up with them. One by one, tiny communities began to spring up all along the coast between Maine and Massachusetts. Some were established without authority from the Council at Plymouth or its grantees; [31] others without sufficient regard to definite

[29] 4 Thorpe, Federal and State Constitutions (1909), at 2434. In 1635, the council at Plymouth confirmed the grant to Mason made in 1629, but used somewhat different language, including specific langunge granting to Mason "the south half of the Isles of Shoals." 1 New Hampshire Provincial Papers (1867), at 32–33.

[30] Of some interest is the so-called Laconia patent issued by the Council at Plymouth to Gorges and Mason jointly just 10 days after the New Hampshire Grant. The Laconia Grant pertained to areas in Canada which the adventurers thought could be reached via the Piscatagua and Merrimack Rivers and which would be available since the French had supposedly just been defeated. Baxter, *supra*, vol. I, at 152–153. To insure the use of Odiorne's Point in the Piscatagua for this purpose, the Council of Plymouth regranted the area to Mason and Gorges jointly. Jenness, *supra*, at 32–36, 82–84.

[31] Burrage, *supra*, at 198–199.

boundaries.[32] Consequently, boundary disputes arose which lasted for decades. In particular, the Puritans of Massachusetts Bay, eager to claim new lands for their rapidly expanding colony, eyed the nearby Mason and Gorges grants covetously. The inability of Mason and Gorges to effectively exercise any governmental control over their possessions in the 1630s laid the groundwork for Massachusetts to take over both colonies, at least temporarily.

Mason died in 1635; Gorges lingered on until 1647. Though the King had finally granted a royal charter for the Province of Maine in 1639,[33] Gorges was too old and

[32] Baxter, *supra*, vol. I, at 154.

[33] This charter, dated April 15, 1639, is reprinted at 3 Thorpe, Federal and State Constitutions (1909), at 1625–1637. The operative grant is as follows:

"Wee . . . graunte and confirme unto the said Sir Fardinando Gorges his heires and assignes All that Parte Purparte and Porcon of the Mayne Lande of New England aforesaid beginning att the entrance of Pascataway Harbor and soe to passe upp the same into the River of Newichewanocke and through the same unto the furthest heade thereof and from thence Northwestwards till one hundred and twenty miles bee finished and from Pascataway Harbor mouth aforesaid Northeastwards along the Sea Coasts to Sagadahocke and upp the River thereof to Kynybequy River and through the same unto the heade thereof and into the Lande Northwestwards untill one hundred and twenty myles bee ended being accompted from the mouth of Sagadahocke and from the period of one hundred and twenty myles aforesaid to crosse over Lande to the one hundred and twenty myles end formerly reckoned upp into the Lande from Pascataway Harbor through Newichewanocke River and alsoe the Northe halfe of the Isles of Shoales together with the Isles of Capawock and Nawtican neere Cape Cod as alsoe all the Islands and Iletts lyeinge within five leagues of the Mayne all alonge the aforesaide Coasts betweene the aforesaid River of Pascataway and Segadahocke with all the Creekes Havens and Harbors thereunto belonginge and the Revercon and Revercons Remaynder and Remaynders of all and singular the said Landes Rivers and Premisses All which said Part Purpart or Porcon of the Mayne Lande and all and every the Premises herein before named Wee Doe for us our heires and successors create and incorporate into One Province or Countie . . . ."

poor to achieve his grandiose scheme of establishing his own palatinate.

Following Mason's death, the area degenerated into random violence and dissension, and its residents were ripe for negotiations respecting an incorporation of New Hampshire into Massachusetts. In 1639, the residents of Exeter signed an agreement to submit to the jurisdiction of Massachusetts,[34] but it was not until October 9, 1641, that a formal Act of Annexation was passed by the Massachusetts Legislature accepting the inhabitants of Piscataqua "under the Government" of the Massachusetts Bay Colony.[35] A decade later, perceiving that the province of Maine might be ready for a similar arrangement, Massachusetts tendered her protection to the nearest of the Maine settlements, Kittery. On November 20, 1652, 41 of the inhabitants of Kittery (apparently a large majority of the area's freemen) subscribed to a declaration subjecting themselves "to the government of Massachusetts bay in New England." [36] The chaos which was the legacy of Gorges' efforts to establish a proprietary colony also affected the holders of the "Plough patent," and a majority of Maine's freemen voted on July 13, 1658, to follow the lead of Kittery in submitting to the government of Massachusetts.[37] Thus by the end of the 1650s, Massachusetts controlled all of New England from Cape Code north,[38] but, though Mason and Gorges were

[34] 4 Thorpe, Federal and State Constitutions (1909), at 2445.

[35] Jenness, *supra*, at 59–60. Significantly the annexation rested solely on the claim that the New Hampshire territory lay within the original chartered limits of the Bay Colony; it made no mention whatever of the Hilton Patent (from Gorges to Edward Hilton), nor of any surrender of jurisdiction over it by its proprietors, nor of the voluntary submission of the people, "though by these means only had the Massachusetts got the control of the river." *Ibid.*

[36] Burrage, *supra*, at 375.

[37] *Id.*, at 381.

[38] In 1640, the Plymouth colony had surrendered its patent and merged with the Massachusetts Bay Colony. 3 Thorpe, Federal and State Constitutions (1909), at 1861–1862.

dead, the claims of their heirs remained to haunt the development of that area, for the days of the Commonwealth were numbered and the interests of the Royalists would again be in ascendancy.

The controversy between Massachusetts and the heirs of Mason and Gorges was given over to the Lords Chief Justices of the Courts of King's Bench and Common Pleas for resolution, and, on July 20, 1677, they delivered their opinion.[39] Massachusetts had previously disclaimed any legal title to the lands in Maine and New Hampshire, but the court declined to rule conclusively on the validity of the titles of Robert Mason and Ferdinando Gorges, the grandsons of the original grantees, on the ground that the territory was then in the possession of other individuals not before the court.

Gorges' grandson, perceiving that he had won a skirmish and not the war, despaired of ever achieving benefit from his inheritance, and sold all his rights in Maine to an *ad hoc* agent of Massachusetts named John Usher for £1,250.[40] Young Mason, however, persevered, and the King recognized an opportunity to establish the first successful royal government in New England. On September 18, 1679, the King issued a commission ordering Massachusetts to withdraw from New Hampshire, appointing one John Cutt as "president" of the province to govern with a council, and recognizing Mason's property interests in the tract.[41] Unfortunately for Mason his travails were only beginning, for those appointed by the King as president and council—with power to decide property disputes—were strongly opposed to Mason's claims.[42] Although the decree of 1679 served to establish New Hampshire as an independent entity—except for a few years during and after the unpleasantly recalled "Dominion of New England" under Sir Edmund Andros in the late 1680s[43]—Mason was never able to obtain any satisfaction from his proprietorship. Indeed, after decades of labrynthian court suits and appeals which were hopelessly inconclusive, the assembly of New Hampshire purchased the release of the whole Masonian interest for £1,000 from the great-great-great grandson of Captain Mason in 1738.[44]

Between the appointment of Cutt and the time of the Revolution, there followed a succession of provincial governors of New Hampshire and of Massachusetts, which had been formally rechartered by the King in 1691 to include the province of Maine.[45] Although the royal governor of one province was frequently appointed to serve as royal governor of the other, the provinces of Massachusetts and New Hampshire grew apart, and their interests began to clash. By the first decades of the 18th century, conflicting grants of land were being made along the border areas, and a major boundary dispute emerged regarding the Merrimack River. It was the

[39] Reprinted in Belknap, *supra*, vol. I, App., at 449–452.

[40] Baxter, *supra*, vol. II, at 173.

[41] The "Cutt Commission" is reprinted in 4 Thorpe, Federal and State Constitutions (1909), at 2446–2451.

[42] It is said regarding these appointments that "there were not in the whole province straighter Puritans or firmer friends of the Massachusetts colony. . . . They hated Mason for detaching the province from Massachusetts, and they hated his claim to the soil more." Tuttle, "Establishment of the Royal Provincial Government of New Hampshire—1680," in Laws of New Hampshire (1904), Vol. I, at 778.

[43] His commission is reprinted at 3 Thorpe, Federal and State Constitutions (1909), at 1863–1869.

[44] The history of this wondrously complicated litigation is told in Belknap, *supra*, vol. I, at 102–103, 111–115, 117, 121–124, 148–152, 157–166, 252–254.

[45] This new charter also joined to Massachusetts and Maine that part of northern New England previously granted to the Duke of York and known as "Pemaquid" which extended from the Kennebec River to the St. Croix, see 3 Thorpe, Federal and State Constitutions (1909), 1637–1644. The 1691 Charter is reprinted in 3 Thorpe, *supra*, at 1870–1886. The impact of this charter on the present litigation is discussed *infra*, at n. 93–95.

controversy over this border which led to the royal decree of 1740, a decree that set forth both the northern and the southern boundaries of New Hampshire and remains the authoritative declaration of those lines.

Like Massachusetts' earlier effort to exercise jurisdiction over Maine and New Hampshire following the death of Mason and later of Gorges, the legal issue as to New Hampshire's southern boundary, focused on the language of its grant along the Merrimack River, and no small amount of territory was at stake. This was the primary controversy;[46] however, the matter of the boundary between New Hampshire and the Maine portion of Massachusetts in its more northerly reaches was also considered. In 1731, a committee of representatives from the two provinces met at Newbury in an attempt to resolve the dispute, but they were unable to agree and soon separated.[47] Thereupon, the agents of New Hampshire presented the matter to King George II who, in turn, referred it to the Board of Trade.[48]

[46] Belknap has described the motivations of New Hampshire in this dispute as follows:

"It must be observed, that the party in New-Hampshire, who were now earnestly engaged in the establishment of the boundary lines, had another object in view, to which this was subordinate. Their avowed intention was to finish a long controversy, which had proved a source of inconvenience to the people who resided on the disputed lands, or those who sought an interest in them; but their secret design was to displace Belcher, and obtain a governor who should have no connexion with Massachusetts. To accomplish the principal, it was necessary that the subordinate object should be vigorously pursued. The government of New Hampshire, with a salary of six hundred pounds, and perquisites amounting to two hundred pounds more, equal in the whole to about eight hundred dollars per annum, was thought to be not worthy the attention of any gentleman; but if the lines could be extended on both sides, there would be at once an increase of territory, and a prospect of speculating in landed property; and in future there would be an increase of cultivation, and consequently of ability to support a governor."

Belknap, *supra*, vol. I, at 237.

[47] 2 W. Williamson, The History of the State of Maine (1839), at 194.

As is not unusual in complicated cases, time waited on law, and the dispute remained under consideration by the Board of Trade until 1735 when it was recommended that commissioners from the other New England colonies be appointed to settle the question. Further delay ensued, but finally, on April 9, 1737, a commission was signed by the King appointing 20 members of the provincial councils in New York, New Jersey, Rhode Island, and Nova Scotia to serve as commissioners in the dispute.[49] In August, they convened in Hampton, New Hampshire, to hear evidence and arguments on the question. Much of the debate that then followed is of no particular relevance to the present boundary dispute since it focused on the Merrimack boundary, but there was some controversy over the Piscataqua boundary between New Hampshire and Maine.

3. The 1740 Decree.

In its brief before the commissioners, New Hampshire argued that:

"[T]he northern boundary of New Hampshire

[48] A word of explanation about the system at home through which royal authority over the colonies was exercised is in order:

"The Privy Council was the department upon which the primary responsibility for the administration of the colonies devolved. In 1660 a committee was appointed for the purpose of advising and assisting the Privy Council relative to the administration of the colonies. At the same time another sub-committee was appointed to advise in regard to trade. In 1674 the plan of a dual committee was abandoned, and a board of twenty-four members was appointed for the purposes mentioned above. This was known as the Lords Commissioners for Trade and Plantations. The next important change occurred in 1696, when the Board of Trade was inaugurated. This instrumentality was maintained in the colonial business until the end of the province period."

Introduction, 2 Laws of New Hampshire (1913), at xlvii.

[49] The Commission is reprinted in 2 Laws of New Hampshire (1913), App., at 768–770.

should begin at the entrance of Piscataqua Harbor and so to pass up the same into the River of Newichwannock [now the Salmon Falls] and through the same into the furthest head thereof, and from thence northwestward (that is north less than a quarter of a point westerly) as far as the British Dominion extends and also the western half of the Isles of Shoals . . . ." [50]

Massachusetts, on the other hand, claimed the following:

"And on the northerly side of New Hampshire a boundary line beginning at the entrance of Piscataqua Harbour, passing up the same to the River Nevichwannock through that to the furthest head thereof, and from thence a due northwest line . . . ." [51]

In the debates on this boundary, the focus was clearly on the northern extension of the line, for the division of the land around Piscataqua Harbour and the Isles of Shoals appeared well agreed upon. Indeed, one of New Hampshire's arguments regarding the northern limits depended upon the well-known division of the Isles of Shoals between the provinces.

Massachusetts had argued that the phrase "northwestward" in the 1691 recharter of Massachusetts and Maine [52] meant 45° west of north, but New Hampshire,

[50] Proceedings of the Commissioners for settling of Boundary Lines between the Provinces of the Massachusetts Bay and New Hampshire, dated at Hampton in New England the 19th of October 1737, at 10, attached as Appendix B to this report and referred to hereinafter as Proceedings.

[51] Proceedings, at 21–22.

[52] The grant provides:

"[A]lsoe all that part or pareon of Main Land beginning at the Entrance of Pescattaway Harbour and soe to pass upp the same into the River of Newickewnannock and through the same into the furthest head thereof and from thence *Northwestward* till One Hundred and Twenty Miles be finished . . . ." (Emphasis added.) 3 Thorpe, Federal and State Constitutions (1909), at 1876.

relying on the common understanding of the boundaries of the Isles of Shoals, made the following argument:

"What is offered in the demands of the Massachusetts appears to us so highly unreasonable that we have been lead to say more than otherwise we should. But on this part of the dispute we would only add that if after all your Honours should be inclined to think this line was intended to be a parallel to the river, we cant think that you will with them be of opinion it should be so where the river runs north, because to us it appears an affront to common sense as to the northern boundary of New Hampshire or the line that should be run between that part of the Province of the Massachusetts Bay, which was the late Province of Main and New Hampshire, we think that the Massachusetts can claim no further than the bounds set forth in their Charter and the setting that point ends the dispute, for we say what is not within their Province is within ours, now the words of the Charter must be the guide here as well as on the other side, and so far as the river runs there can be no dispute, and by the word directing the course afterwards viz.: Northwestward, can with propriety be meant nothing but a few degrees west of the north, and is an equivalent expression or the same with northwesterly, which is always understood to mean a few degrees less than a quarter of a point west of the north, and this course it ought to run from the head of the river now called Salmon Falls, which is at a pond. We are confirmed in this opinion, because the half [140] of the Isles of Shoals lies in the Province of the Massachusetts, viz.: The easterly half between which and the other half lyes the harbour or road, which is near south from Piscataqua River. Now if the line from the head of the river should be northwest, this from the mouth of the river should

be southeast, and then all the Isles of Shoals will fall in the Province of New Hampshire contrary to the express words of the Charter." [53]

This argument adduced by New Hampshire is of particular interest to the present dispute for what it tells us about the way in which the parties conceived the geography of the time and their assumption—seemingly confirmed by the result of that case—that the Isles of Shoals were naturally parted by a straight line drawn from the mouth of the Piscataqua Harbour. Though Belknap is critical of New Hampshire's logic in this argument, its usefulness in evaluating the meaning of the ultimate decree cannot be gainsaid.

Belknap comments:

"The agents for Massachusetts, when this claim was put in by New Hampshire, could hardly think it was seriously meant . . . . The only ostensible reason, given for this construction was, that if a northwest line had been intended, then a southeast line, drawn from the mouth of the harbour, would leave all the Isles of Shoals in New Hampshire; whereas the dividing line runs between them. On the other side, it might be said, with equal propriety, that a line drawn south, two degrees east, from the mouth of the harbour, would leave all these islands in Massachusetts. For the point where the islands are devided bears south, twenty-nine degrees east, from the middle of the harbour's mouth; the variation of the needle being six degrees west." [54]

Without knowing more about Belknap's own charts, of course, his plotting of the bearings of the Isles of Shoals is meaningless, but it is obvious that he, like New Hampshire's agents before the royal commissioners, assumed that a straight line projected from the harbour's mouth

[53] Proceedings, at 32–33.

[54] Belknap, *supra*, vol. I, at 249.

to the islands. This is confirmed somewhat by reference to the map of New Hampshire's boundaries drawn by the surveyor George Mitchell at the order of the Commissioners, and attached to this report as Appendix C. By visual inspection, one observes that the only line which could naturally pass to the center of the harbor of the Isle of Shoals would be a straight line drawn from the mouth of the harbor, which appears to be the seawardmost points of land in the two colonies.

Of some interest to the present dispute, also, is the other of the "controvered questions" about the Maine-New Hampshire boundary, *i. e.*, "whether the line should run up the middle of the river or on its northeasterly shore." [55] Though nothing was said of this issue in the proceedings, it appears as a part of New Hampshire's subsequent claim of error.[56] In its final decision dated September 2, 1737, the Commissioners held, in part, as follows.

"And as to the Northern Boundary between the Said Provinces the Court Resolve & Determine that the Dividing Line Shall pass up thro' the mouth of Piscataqua Harbour & up the Middle of the River into y^e^ River of Newichwannock (part of which is now called Salmon Falls) & thro' the Middle of the Same to the furthest head thereof & from thence North two Degrees Westerly until one hundred & twenty Miles be finished from y^e^ Mouth of Piscataqua Harbour aforesai^d^ or until it meets with His Majestys Government^ts^ and that the Dividing line shall part the Isles of Shoals & run thro' the Middle of the Harbour between the Islands to the sea on the Southerly Side & that the Southwesterly part of the Said Islands Shall lye in & be accounted part of the Prov. of New Hamp^r^ & that y^e^ North Easterly part

[55] Williamson, *supra*, at 196–197; Belknap, *supra*, vol. I, at 245.

[56] See text, *infra*, at nn. 83–85.

thereof shall lie in & be Accounted part of the Prov. of the Mass[a] Bay & be held & Enjoyed by the Said Prov[a] Respectively in the Same manner as they Now do & have heretofore held and Enjoyed the Same . . . ." [57]

This was a decision quite to the liking of New Hampshire regarding the northern extension of its boundary with Maine, but not as to the Piscataqua Harbour area. Accordingly, the agents of New Hampshire, at the direction of its legislature, filed exceptions with the Commissioners on October 14, 1737, in part as follows:

"[3d]ly and as to the Northern Boundary: We object against that part of the Judgm[t] that Says: 'Through the Mouth of Piscataqua Harbour and up the Midle of the River' Because we humbly conceive that m[r] Gorges Patent, By which the Mass[a] Claime, doth not convey any Right to the River. For the whole of that River and the Jurisdiction thereof hath Ever been in the Possession of this Province and never Claimed by the Massachusets: and this Province in order to preserve & Safeg'ard the same have always had a Castle and maintaind a Garrison there . . . ." [58]

This issue was again raised by New Hampshire in its petition of appeal to the King, by way of complaining about the conduct of the royal governor, Jonathan Belcher, who held commissions as governor of both New Hampshire and Massachusetts. The petition stated in relevant part:

"And by such votes or Exceptions the New Hamp[r] Assembly humbly Insisted that . . . the Assembly Objected . . . against the Com[rs] adjudging to the Massachusetts Bay the half of Piscataqua River

[57] 2 Laws of New Hampshire (1913), App. at 771.

[58] 2 Laws of New Hampshire (1913), App., at 772; Proceedings, at 204.

when the same was not Included in their grant nor had been ever pretended to or demanded by them their grant Extending to Land Only and not to the River and in generall Insisted that the Bounds should be According to the Demands filed by New Hamp[r]

"Which Objections or Exceptions the Com[rs] Rec[d] tho the Agent for the Massachusetts Bay very Demurely opposed the same as not coming from the whole Legislature when their own Gov[r] had so Contrived as to make that absolutely Impossible . . . ." [59]

Massachusetts, meanwhile, was not silent in criticizing the Commisioners' decision, and filed its own exception and appeal, principally attacking the delimitation of the northern extension of the boundary between New Hampshire and Maine,[60] as well as the Merrimack River

[59] 2 Laws of New Hampshire (1913), App., at 779.

[60] In this regard, Massachusetts argued:

"The Province of the Massachusetts also declare themselves aggrieved at the Determination of the Said Hon[ble] Commissioners touching at the Northermost Line Viz[t] Where it adjudges.

"1[st] That that Line Shall proceed from the furthest Head of Newichawannock River North two Degrees Westerly; Whereas it Should have been that it Should proceed thence Northwestward, which is a well known & certain Course, the Same, as towards the Northwest, and makes a Right Angle with the Line directed by this Province Charter to run from Piscataqua Harbour's Mouth Northeastward along the Sea Coast to Sagadahock, which lyes towards the Northeast; For we cannot Suppose that when their Royal Majesty's King Charles the first, King William & Queen Mary used these Terms Northwestward & Northeastward to express the Course of those two Lines with certainty, and to the understanding of mankind, their Intent & Meanig could be, that the Line runing up the River One Hundred & twenty Miles Should be North two Degrees East; For this would make the Province of Main instead of a Tract of Land of One Hundred & twenty Miles Square, only a Gore, being at one End a Point, & but eight Miles wide at the other, not one Twentieth part of their Grant."

2 Laws of New Hampshire (1913), App., at 782.

boundary, which had gone against it. On July 26, 1738, the appeal was referred by the King to the Lords of the Committee of the Privy Council for Hearing Appeals from the Plantations, and, after more than a year of deliberation, the committee recommended acceptance of the Commisioners' decision on the Maine-New Hampshire boundary without change.[61] On April 9, 1740, King George II signed a decree accepting the Committee's recommendation and thus permanently fixed the Maine-New Hampshire boundary.[62]

[61] The boundary between New Hampshire and Massachusetts along the Merrimack was modified, see 2 Laws of New Hampshire (1913), App., at 793–794, but due to an apparent surveyor's error the line was never finally located until an interstate agreement in 1895. *Id.*, at 790.

[62] Williamson suggests political motivation in the King's approval of the report, commenting:

"At the instance of the Massachusetts' agents, the opinion of the learned Dr. Halley was obtained; who very correctly certified, that 'a line north-westward,' ought to run 45 degrees westward of the north point. This was a mathematical truth; and it might have been applied with good effect, had not the New Hampshire agents, with some success, touched the strings of ministerial clemency, by representing their poor, little, loyal, distressed Province, as in great danger of being devoured by the opulent and overgrown Province of Massachusetts. Whereas, said they, if the borders of New-Hampshire were enlarged,—alluding to her southern more than to her eastern limits,—her abilities might enable her to support a Governor, separate from any other Province." Williamson, *supra*, vol. 2, at 168–169.

To say this, however, is not to say anything startling, for political and economic interests are inextricably bound up with border disputes. Of greater relevance to an enlightened view of these events are the remarks of Belknap regarding the so-called "Wheelwright grant," a possibly spurious document purporting to be a deed of land from various Indian Chiefs to one John Wheelwright ("late of England, minister of the gospel") dated May of 1629, granting the following territory:

"[All] that part of the main land bounded by the river of Piscataqua, and the River of Merrimack . . . and the main channel of each river from Pantuckett and Neckewannock Falls to the main sea to be the side bounds, and the main sea between Piscaqua River and Merrimack River to be the lower bound, together with all islands within said bounds, as also the Isles of Shoals so called by the English . . . ." Proceedings, at 137.

For a brief discussion of the validity of this document, see 4 Thorpe, Federal and State Constitutions (1909), at 2520–2521. Although this grant has never been deemed to be of any significance in title or boundary considerations, the following passage from Belknap about the Wheelwright patent is thought provoking, especially in light of this Nation's increased sensitivity to native Americans:

"By this deed, the English inhabitants with these links obtained a right to the soil from the original proprietors, more valuable in a moral view, than the grants of any European prince could convey. If we smile at the arrogance of a Roman Pontiff in assuming to divide the whole new world between the Spaniards and Portuguese, with what consistency can we admit the right of a king of England, to parcel out America to his subjects, when he had neither purchased nor conquered it, nor could pretend any other title, than that some of his subjects were the first Europeans who discovered it, whilst it was in possession of its native lords? The only validity which such grants could have in the eye of reason was, that the grantees had from their prince a permission to negotiate with the possessors for the purchase of the soil, and thereupon a power of jurisdiction subordinate to his crown." Belknap, *supra*, vol. I, at 8.

This boundary decreed by the King during the provincial period remained the same when Massachusetts and New Hampshire helped to form the Union and, later, when Maine was formally separated from Massachusetts in 1819 [63] and admitted to the Union.[64] Unlike the congressional enabling acts for other States subsequently admitted to the Union, neither the acts of ratification of the Articles of Confederation or the Constitution passed by Massachusetts and New Hampshire, nor the congressional act admitting Maine in 1820 specifically defined the boundaries of these States, and the States entered the Union with boundaries fixed as of

[63] Act of June 19, 1819, c. CLXI, Laws of the Commonwealth of Massachusetts.

[64] Act of April 7, 1820, c. XIX, 3 Stat. 544.

that date.[65] For all intents and purposes, the decree of 1740 fixed the boundary in the Piscataqua Harbor area, and nothing has been done by the legislatures of those States to alter these territorial limits. The question in this case therefore is the proper interpretation of that decree's language and its effect upon the disputed boundary.

4. Application of the 1740 Decree.

As stated above, the 1740 decree provided, in part,:

> "That the Dividing Line shall pass up through the Mouth of Piscataqua Harbour and up the Middle of the River . . . And That the Dividing Line shall part the Isles of Shoals and run through the Middle of the Harbour between the Islands to the Sea on the Southerly Side . . . ."

To interpret this language and apply it to the geography of the area, it is necessary to break the decree down into the essential elements: (1) What is meant by "the Mouth of Piscataqua Harbour"; (2) What is meant by "the Middle of the River"; (3) Where does the line parting the Isles of Shoals begin to "run through the Middle of the Harbour"; and (4) How shall "the Dividing Line" proceed between the mouth of the Piscataqua and the Isles of Shoals? These will be taken up seriatim.

(a) *The Mouth of the Piscataqua.*

In its original complaint and pretrial submissions, the State of New Hampshire took the position that the mouth of Piscataqua Harbour (now Portsmouth Harbor)

[65] Cf. *New Jersey* v. *Delaware*, 291 U. S. 361, 370–371 (1934). It has been said that: "In general, the original states maintained their claims to their colonial boundaries." Griffin, "Delimitation of Ocean Space Boundaries between Adjacent Coastal States of the United States," in Proceedings of the Third Annual Conference of the Law of the Sea Institute, June 24–27, 1968, University of Rhode Island (1969), at 143. Accord F. Van Zandt, Boundaries of the United States and the Several States (U. S. Geological Survey Bulletin 1212, 1966), at 2.

lay between Jaffrey Point on New Castle Island and Pochahontas Point on Gerrish Island (formerly Champernoun's Island). *Amici curiae* suggest in their submission that the mouth of the harbor was historically considered to be at Fort Point on New Castle Island, or, alternatively that "the present day closing line of the harbor [is] the Frost Point—Wood Island—Gerrish Island line,"[66] which corresponds roughly to that claimed by New Hampshire. Maine in its pretrial submissions, on the other hand, asserts that the mouth of the harbor is "at a line extending from the headland at Odiorne's Point, Rye, New Hampshire, to the headland south of Seaward's Cove, on Gerrish Island." Though such a phrase as "mouth" is difficult to define,[67] it is the conclusion of the Special Master that the term "Mouth of Piscataqua Harbour" in the 1740 decree could only mean

[66] Brief of *Amici Curiae* in Reply to Plaintiff's Brief in Support of Proposed Consent Decree (filed February 26, 1975), at 4.

[67] The King in Council would have done well to have heeded the following advice from one "expert":

> "It is likewise fallacious, and dangerous in boundary-making, to assume that a river has a mouth which is a precise point. Some rivers have no mouths, sinking in desert sands or losing themselves in swamps. Others have several mouths entering the sea through deltas. Many important navigable rivers are of this type. Even those rivers with a single embouchure give trouble to the boundary-maker. The mouth is an area, not a point. Also, it may be questioned whether the mouth-area lies at the head of the estuary or bay or at the entrance into the estuary or bay from the seas. In short, the same recommendations apply to mouths as to sources: if possible, a precise point should be defined; failing that, 'a convenient point near the mouth' may be stipulated.
>
> "The mouth of a navigable river is often its most important part, yet there may be less natural indication of where the boundary should like than along the course of some remote non-navigable tributary. If the river ends in a delta, there may be several mouths, perhaps no principal mouth, and new mouths may be opened and old ones abandoned."

S. Jones, Boundary-Making: A Handbook (1945), at 130 (footnotes omitted).

the opening between the seawardmost points of land at which the shore "turns" as the Piscataqua River flows into the ocean, *i. e.*, at a line extending from Odiorne's Point (at approximately 43°2′32.1″ North and 70°42′-38.4″ West) to a point southwest of Seward's Cove on Gerrish Island (at approximately 43°3′52.0″ North and 70°41′15.5″ West). [All "Calls" refer to the stipulated Chart 211.]

Maps contemporary to the King's decree and historical texts support this conclusion. For example, Mitchell's map, alluded to earlier as being drawn for the boundary commissioners,[68] has the phrase "The Mouth of Piscataqua Harb'r" written through the opening between Odiorne's Point and Gerrish Island, beginning well out in the ocean, and depicts New Castle Island (or Great Island) as simply "floating" slightly north of the harbor. *Amici curiae* rely on certain references in historical texts for their claim that Fort Point on New Castle Island lies at the entrance of the harbor, but it is clear from the context of these statements that they are meant in a strategic or nautical sense and not in the geographic sense. One reference, for example, is to "the fort which commandeth the mouth of the harbor"; [69] another, which gives sailing instructions for navigating along the New England coast, refers to the Portsmouth lighthouse on "Fort Point (New Castle Island) at the entrance of the harbour." [70] More to the point, however, is Belknap's remark in his

[68] G. Mitchell, "A Plan of the Rivers and Boundary Lines referred to in the Proceedings and Judgment [of the Commissioners for Settling the Boundary Lines between the Provinces of the Massachusetts Bay and New Hampshire]" (1737). Attached as Appendix C.

[69] Letter from Edmund Randolph to the Lords of Trade and Plantations, in Belknap, *supra*, vol. I, App., at 463. See Addendum to Accompany Brief of *Amici Curiae* (filed Feb. 21, 1975), at Enclosure 3.

[70] Blunt, American Coast Pilot (1822), at 146. See Addendum to Accompany Brief of *Amici Curiae* (filed Feb. 21, 1975), at Enclosure 5.

"Description of the harbour and river of Pascataqua" that:

> "In the middle of the harbour's mouth, lies Great Island, on which the town of Newcastle is built." [71]

Belknap goes on to make a sensible distinction between the "main entrance" into the actual harbor area (between the north side of Great Island and Kittery Shore) and the "other entrance" on the south side of Great Island called Little Harbor,[72] but it is a distinction which hardly detracts from the obviousness of the harbor's mouth as extending from Odiorne's Point to Gerrish Island. Moreover, as was pointed out, *supra*, the earliest New Hampshire settlement was founded by David Thompson at the mouth of the Piscataqua on Odiorne's Point.[73] That the Commissions and the King likely intended the phrase "mouth of Piscataqua Harbor" to mean a line essentially like the one now recommended by the Special Master is additionally confirmed by a study of several early maps. One detailed map, which is dedicated to Charles II's brother, James, Duke of York, and hence dated in the late 17th century, unequivocally portrays the opening between Odiorne's Point and "Champernones Island" (Gerrish Island) as the harbor mouth.[74] Other maps of that period are in accord.[75]

[71] Belknap, *supra*, vol. II, at 145.

[72] *Id.*, at 145–146.

[73] See text, *supra*, at n. 22.

[74] I [?] 8 [?]—"Pascataway River in New England" in The Crown Collection of Photographs of American Maps (Hulbert, ed., 1904), Vol. I, No. 23. Attached as Appendix D.

[75] See, *e. g.*, the following maps: Hack [?], "The Province of Mayne" (1680); Morden, "New England" in R. Blome, The Present state of His Majesties isles and Territories in America (London 1687), at 210; map in C. Mathew, Magnolia Christi's Americana (London 1702); Jeffry "A Draft of that Part of the Province of New Hampshire, etc.," (1720); Colonel Dunbar, "New Hampshire" (1730); Morris, "Draft of the Northern English Colonies" (1749); Belknap, "A New Map of New Hampshire" (1791). All of these

New Hampshire has drawn attention to nautical publications which describe the mouth of Portsmouth Harbor as "a cross section between Odiornes Point and the rocky reefs and islands south of Gerrish Island" or as "a line joining Odiores Point and Kitts Rock whistle buoy."[76] Since the question is the meaning of the 1740 decree, it cannot be said that uncharted "rocky reefs" or later navigational aids could have played any part in the deliberations of the King and Commissioners, but rather a location on more solid land was intended.

(b) *The Middle of the River.*

Next is the question of what is meant by the term "middle of the river" in the 1740 decree. This could mean either the geographic middle of the river or the middle of the main channel, *i. e.*, the so-called "thalweg." The Supreme Court recently discussed such an issue in the context of a boundary dispute between Texas and Louisiana, stating:

> "The argument that the middle of the main channel was intended rests on the line of cases in this Court beginning with *Iowa* v. *Illinois*, 147 U. S. 1 (1893), which holds that in normal circumstances it should be assumed Congress intends the word 'middle' to mean 'middle of the main channel' in order that each State would have equal access to the main navigable channel. The doctrine was borrowed from international law and has often been adhered to in this Court, although it is plain that within the United States two States bordering on a navigable river would have equal access to it for the purposes of navigation whether the common state boundary was in the geographic middle or along the thalweg."

maps may be found in the Permanent Collection of the Geography and Map Division, Library of Congress.

[76] A Hoskinson & E. LeLacheur, Tides and Currents in Portsmouth Harbor (U. S. C. & G. S., 1929), at 2, 29.

> *Id.*, at 7, 8, 10. *New Jersey* v. *Delaware*, 291 U. S. 361, 380–385 (1934).
>
> "In *Iowa* v. *Illinois*, however, the Court recognized that the issue was the intent of Congress. [In the enabling acts which admitted Texas and Louisiana into the union] 147 U. S., at 11 and that it was merely announcing a rule of construction with respect to statutes and other boundary instruments. Thus, it was acknowledged that the rule might be changed by 'statute or usage of so great a length of time as to have acquired the force of law.' *Id.*, at 10. When Congress sufficiently indicates that it intends a different boundary in a navigable river, the Thalweg rule will not apply."

Texas v. *Louisiana*, 410 U. S. 702, 709–710 (1973) (footnotes omitted). In addition, the Court remarked in a footnote as follows:

> "That the 'middle' of a river was to be construed as the thalweg in establishing the boundary between the States newly admitted to the Union was not authoritative doctrine prior to 1892 when *Iowa* v. *Illinois*, 147 U. S. 1, was decided and certainly not when Louisiana was admitted to the Union in 1812. The opinion in *Iowa* v. *Illinois*, *supra*, referred to five treatises on international law in support of its holding . . . ." *Id.*, at 709 n. 6.

Although perhaps not "authoritative doctrine" in the United States Congress, one commentator asserts that the thalweg principle was "a doctrine laid down in Roman Law and in vogue among the Anglo-Saxons as early at least as the seventh century."[77] Mr. Justice Cardozo in *New Jersey* v. *Delaware*, 291 U. S. 361 (1934), traced the history of the doctrine at length:

> "Anciently, we are informed, there was a principle

[77] Fulton, The Sovereignty of the Sea (1911), quoted in G. Knight, The Law of the Sea: Cases, Documents, and Readings (1975), at 57.

of co-dominion by which boundary streams to their entire width were held in common ownership by the proprietors on either side. 1 Hyde, International Law, p. 243, § 137. Then, with Grotius and Vattel, came the notion of equality of division (Nys, Droit International, vol. 1, pp. 425, 426, Hyde, *supra*, p. 244, citing Grotius, De Jure Belli et Pacis, and Vattel, Law of Nations), though how this was to be attained was still indefinite and uncertain, as the citations from Grotius and Vattel show. Finally, about the end of the eighteenth century, the formula acquired precision, the middle of the 'stream' becoming the middle of the 'channel.' There are statements by the commentators that the term Thalweg is to be traced to the Congress of Rastadt in 1797 (Englehardt, Du Regime Conventionnel des Fleuves Internationaux, p. 72; Koch, Histoire des Traites de Paix, vol. 5, p. 156), and the Treaty of Luneville in 1801. Hyde, *supra*, pp. 245, 246; Kaeckenbeck, International Rivers, p. 176; Adami, National Frontiers, translated by Behrens, p. 17. If the term was then new, the notion of equality was not. There are treaties before the Peace of Luneville in which the boundary is described as the middle of the channel, though, it seems, without thought that in this there was an innovation, or that the meaning would have been different if the boundary had been declared to follow the middle of the stream. Hyde, *supra*, p. 246. Thus, in the Treaty of October 27, 1795, between the United States and Spain (Ar icle IV), it is 'agreed that the western boundary of the United States which separates them from the Spanish colony of Louisiana is in the middle of the channel or bed of the River Mississippi.' Miller, Treaties and other International Acts of the United States of America, vol. 2, p. 321. There are other treaties of the same period in which the boundary is described as the middle of the river without further definition; yet this court has held that the phrase was intended to be equivalent to the middle of the channel. *Iowa* v. *Illinois*, 147 U. S. 1, 37 L. ed. 55, 13 S. Ct. 239, *supra*; *Arkansas* v. *Tennessee*, 246 U. S. 158, 62 L. ed. 638, 38 S. Ct. 301, L. R. A. 1918D, 258 and *Arkansas* v. *Mississippi*, 250 U. S. 39, 63 L. ed. 832, 39 S. Ct. 422, *supra*. See, *e. g.*, the Treaty of 1763 between Great Britain, France and Spain, which calls for 'a line drawn along the middle of the River Mississippi.' The truth plainly is that a rule was in the making which was to give fixity and precision to what had been indefinite and fluid. There was still a margin of uncertainty within which conflicting methods of uncertainty within which conflicting methods of division were contending for the mastery." 291 U. S., at 381–383.[78]

[78] Footnotes 5 and 6 accompanying the Court's opinion are as follows:

"Grotius has this to say (De Jure Belli et Pacis, Book 2, chap. 3 § 18): 'In Case of any Doubt, the Jurisdictions on each Side reach to the Middle of the River that runs betwixt them, yet it may be, and in some Places it has actually happened, that the River wholly belongs to one Party; either because the other Nation had not got possession of the other Bank, 'till later, and when their Neighbours were already in Possession of the whole River, or else because Matters were stipulated by some Treaty.'

"In an earlier section (§ 16, subd. 2) he quotes a statement of Tacitus that at a certain point 'the Rhine began . . . to have a fixed Channel, which was proper to serve for a Boundary.'

"Vattel (Law of Nations, *supra*) states the rule as follows: 'If, of two nations inhabiting the opposite banks of the river, neither party can prove that they themselves, or those whose rights they inherit, were the first settlers in those tracts, it is to be supposed that both nations came there at the same time, since neither of them can give any reason for claiming the preference; and in this case the dominion of each will extend to the middle of the river.'

"See also the treaties collected in the Argument of the United

Mr. Justice Cardozo concluded therefore that, at the time of the American Revolution, "the formula of the Thalweg had only a germinal existence," [79] but applied it nevertheless on the grounds of "equality and justice," 291 U. S., at 380, since the doctrine had enough of a "twilight existence" in the late 18th century to justify application in a case where there was *no* written boundary decree.

Turning to the case at hand, there is little in the "legislative history" of the 1740 decree to establish what was meant by the "middle of the river." The references to "channel" in the record of the proceedings of the Commissioners do not support any inference that the Commissioners "had well in mind the 'main channel' concept," [80] as suggested by Maine and New Hampshire. The word "channel" does not appear in the record, but only in relation to: (a) the Merrimack River boundary which was defined by the Original grant in terms of "where it runs into the Atlantic Ocean; [81] and (b) a purported deed of New Hampshire land from certain Indians to one John Wheelwright.[82] Neither use of the word "channel" can be thought apposite to the Thalweg doctrine issue. The only relevant part of the record is New Hampshire's comment in its Petition of Appeal to the King following the decision of the boundary commissioners in which the province objected to "the Commissioners adjudging to the Massachusetts Bay *the half of* Piscataqua River when the same was not included in their

States before the International Boundary Commission in the Chamizal Arbitration of 1910 between the United States and Mexico.

"Nys traces the concept of the Thalweg to a period earlier than the Treaty of Munster, 1648. Droit International, v. 1, p. 426."

[79] 291 U. S., at 383.

[80] New Hampshire's Brief in Support of Proposed Consent Decree and in Reply to *Amici Curiae* (filed Feb. 18, 1975), at 7.

[81] Proceedings, at 26. Maine relied on this passage in its discussion of the matter in its Pretrial Memorandum (filed April 19, 1974), at 3 n. 2.

grant . . . ." [83] The Supreme Court, it should be noted, found the use of the term "one half" by Congress in the 1848 enabling act for Texas to be determinative in *Texas* v. *Louisiana, supra,* 410 U. S., at 1218; 410 U. S., at 1223 (DOUGLAS, J., dissenting).

Of some interest, too, is the common law rule regarding both public and private boundaries along rivers: the owner of each side of a nonnavigable river was presumed to have control of *ad medium filum aquae, i. e.,* to the geographic middle of the river, but the soil at the bottom of a navigable river was presumed to be in the Crown. See *Lord* v. *Commissioners for the City of Sydney,* 12 Moo. P. C. 473, 497–498 (1859); W. Jowitt, ed., The Dictionary of English Law (1959), at 52.

It is the conclusion of the Special Master that the Thalweg doctrine is unavailable as an interpretive tool in this case for the following reasons: (1) as noted by Mr. Justice Cardozo in *New Jersey* v. *Delaware,* the Thalweg doctrine was only in "germinal existence" in the mid-18th century; (2) the Maine-New Hampshire line derives from a written boundary decree, which must be interpreted and not from the pure application of international law principles as in *New Jersey* v. *Delaware;* and (3) the "legislative history" surrounding the 1740 decree, though sparse, suggests that at least one of the colonies, New Hampshire, imagined that "one half" of the river had been allocated to each of the colonies. Together these factors inevitably lead to the conclusion that the geographic middle of the river and not its main or navigable channel was intended by the 1740 decree.

The next question, of course, is how to define the exact course of such a line within the Piscataqua River,

[82] Proceedings, at 137. New Hampshire emphasized this text in its Brief in Support of the Consent Decree and in Reply to *Amici Curiae* (filed Feb. 18, 1975), at 7.

[83] 2 Laws of New Hampshire (1913), App. at 779 (emphasis added).

for the point at which that line crosses the closing line of the harbor is obviously crucial to the resolution of this case. The theoretical answer is that the middle or median line is a continuous line following the meandering of the river and everywhere equidistant from the nearest points on opposite sides using the actual water edges at the mean low water line.[84] For the purposes of

[84] See S. Boggs, International Boundaries: A Study of Boundary Functions and Problems (1940), at 179–184, for an explanation of the principles used in drawing such a line equidistant from the nearest points of either State along the river, including low-tide elevations.

The use of the low water line and low-tide elevations in the Piscataequa River is recommended by several factors. First, the decree of 1740 itself seems to indicate a preference for using the low water line. In describing the southern boundary of New Hampshire, the decree uses the words: "three English Miles North from the Southerly side of the Black Rocks aforesaid at Low Water Mark . . ." Second, Article 11 of the Convention on the Territorial Sea and the Contiguous Zone, entered into force September 10, 1964, 15 U. S. T. (pt. 2) 1607, 1609, T. I. A. S. No. 5639, urges the use of the low water line and low-tide elevations to establish the baseline for measuring the breadth of the territorial sea. Although in this case we are concerned with the inland waters of a river, at least one prominent authority suggests that the baselines be drawn in the same manner. See A. Shalowitz, Shore and Sea Boundaries (1962), at 374 n. 30. Third, the Court has indicated that for purposes of drawing baselines under the Convention's rationale there is "no distinction" between low-tide elevations and islands. *United States* v. *Louisiana*, 394 U. S. 11, 60 n. 80 (1969). The Court recently reaffirmed that determination by accepting the Report of the Special Master, Walter P. Armstrong, Jr., in *United States* v. *Louisiana*, 420 U. S. 529 (1975). See the Report, *supra*, at 35. Finally, even countries not signatories to the Convention, *supra*, have recognized and used low-tide elevations in fixing equidistant lines for boundaries. See, *e. g.*, U. S. Department of State, Bureau of Intelligence and Research, Office of the Geographer, Limits in the Seas, No. 60, Territorial Sea Boundary: Indonesia-Singapore (November 11, 1974); No. 18, Continental Shelf Boundary: Abu Dhabi-Qater (May 29, 1970); and No. 12, Continental Shelf Boundary: Bahrain-Saudi Arabia (March 10, 1970).

The significant points in the Piscataqua Harbor are those low-tide elevations and low water lines on either side of the harbor

the present dispute, however, it is unnecessary to lay out fully the course of the boundary as it proceeds upriver; all that is necessary is the determination of the point at which it crosses the line of the harbor's mouth.[85] Therefore, in this case, it is at approximately 43°3'1.7" North and 70°42'8.0" West.

(c) *The Middle of Gosport Harbor, Isles of Shoals.*

The third step in the interpretation of the Royal Decree is the determination of the "Middle of the Harbour" of the Isles of Shoals. It has been concluded that the Thalweg doctrine is inapplicable to the Piscataqua River line, and the same is true of Gosport Harbor in the Isles of Shoals. It is unavailing to discuss the location or length of any "channel" in this area, since the geographic middle of the harbor must be considered to have been intended by the King and Commissioners. Again as in the Piscataqua River, it is only necessary to identify the point at which the dividing line of the harbor crosses the closing line of the harbor.[86]

In this task, there is unfortunately little in the way of textual or map aids like those that assisted our examination of the Piscataqua Harbor; nevertheless the

that are nearest each other: the low water line at Odiornes Point and rocks that expose at low tide off of Jaffrey Point and in Whaleback Reef.

[85] It would be wise to remind ourselves of the following consolatory words of the Supreme Court in *Texas* v. *Louisiana*, 410 U. S., at 710: "[I]t is plain that within the United States two States bordering on a navigable river would have equal access to it for the purposes of navigation whether the common state boundary was in the geographic middle or along the thalweg."

[86] Thus, it is not necessary to reach the question of whether this conclusion affects the decision of the Supreme Judicial Court of Maine, 100 years ago in *State* v. *Wagner*, 61 Me. 178, 191 (1873), where it was stated:

"[T]here is no room left for doubt that the line follows the ship channel between Star and Cedar Islands, 'through the middle of the harbor between the islands to the sea on the southerly side . . . .'"

Mitchell map (App. C), is somewhat instructive on this question as well. The seven islands comprising the Isles of Shoals were conceived as forming a natural "V"-shaped harbor where, as Belknap points out, ships might take shelter in bad weather "but it is not then safe for those of large bulk." [87] In this light, there can be little doubt that the "harbor" intended by the 1740 decree began at the headlands on the western side of the two islands forming the tips of the "V", *i. e.*, Lunging Island in New Hampshire and Appledore Island in Maine. These points lie at approximately 42°58′40.5″ North and 70°37′38.7″ West on Lunging Island and at approximately 42°59′6.1″ North and 70°37′10.6″ West on Appledore Island. The geographic midpoint of a line between those two points, by force of logic, would represent the center of the harbor at its seawardmost extent, and lies at approximately 42°58′53.1″ North and 70°37′24.6″ West.

(d) *The Line Connecting Piscataqua and Gosport Harbors.*

Having established the two points of significance in the mouth of Piscataqua Harbor and in the middle of Gosport Harbor, it remains to determine what sort of line is to connect them, based upon the 1740 decree. New Hampshire in its original complaint and pretrial submissions asserted that the boundary is a straight line connecting the above-mentioned points; Maine took a different approach in its Answer and pretrial submissions, arguing as follows:

> "The King was concerned solely with drawing a line of separation between two disputing provinces. The King wished to pass the line through the middle of the mouths of these two harbors. His concern, therefore, was not with straightness, but with providing equality of access.
>
> . . . . . .
>
> "It is obvious that the King decreed that the line should follow the middle of the channel down Piscataqua River to its mouth. It is equally obvious that he decreed that the line should pass through the middle of the channel of Gosport Harbor until it reaches the mouth of that harbor. Although he did not decree explicitly how to connect these two lines, it appears that he was most concerned with the pursuit of two distinct courses; therefore, it would seem reasonable to conclude that the King intended that each of these two channel courses should be followed, as a *direct continuation* of those courses, until these two courses intersect. We contend that this is the correct construction of the King's Order." [88]

Alternatively, Maine argued that these two intersecting lines could be "faired" or merged into a single curving line, connecting the midpoints of the harbors' mouths. It is the conclusion of the Special Master that the King and Commissioners did intend to project a line to pass through open waters between the Isles of Shoals and the mainland and passing through the two points ascertained in Part 4 (b) and 4 (c) of this report, to form the boundary separating the Isles of Shoals.[89]

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[87] Belknap, *supra*, vol. II, at 147.

[88] Pretrial Memorandum of Maine (filed April 19, 1974), at 6–8 (footnotes omitted).

[89] But the line could not be treated as an actual boundary in the intervening sea because the Crown could not grant title to the sea. See *The Queen* v. *Keyn*, [1876–1877] L. R. 2 Exch. Div. 63, and text, *infra*, at nn. 98–100. Additionally, the Court has refused to recognize the existence of any historical basis for believing that the colonies owned the marginal sea along their coasts or the natural resources of the seabed beneath those waters, *United States* v. *Maine*, 420 U. S. 515 (1975); *United States* v. *California*, 332 U. S. 19 (1947).

Initially, it is essential to confront the contentions of both parties that the 1740 decree divided the now disputed waters.[90] Certainly the 1691 Chater of Massachusetts Bay and Maine was broad enough to have intended dominion over any internal waters, for, after setting forth the boundaries along the Piscataqua River and granting the north half of the Isles of Shoals, the charter grants:

> "[A]ll lands, grounds, places, soils, woods and wood grounds, havens, *ports, rivers, waters* and other hereditaments and premisses whatsoever lying within the said bounds and limits aforesaid and every part and parcel thereof, and also all Islands and islets lying within ten leagues directly opposite to the main land within the said bounds . . . ." [91]

Thus there is no doubt that dominion over the internal waters of both Portsmouth and Gosport Harbors was granted to the two provinces. But it is questionable whether dominion over the waters of the coastal sea was ever granted.

To be sure, there had been a battle over free fishing between Gorges and Parliament in the early 1620s,[92] and though both the 1635 grant of New Hampshire to Mason from the Council at Plymouth [93] and the royal charter of Maine to Gorges in 1639 included control over fishing

[90] *Amici curiae* disagreed with these contentions and correctly argue that the 1740 decree could not have divided the waters between Piscataqua and Gosport Harbors in such manner as could fix property interests in those waters. *Amici*, however, incorrectly argue that the current boundary should be drawn on the basis of usage alone and inaccurately imply that the 1740 decree is irrelevant to resolution of this dispute. Brief of *Amici Curiae* (filed Jan. 17, 1975), at 27–28.

(1909), at 1876–1877.

[91] Proceedings, at 94; 3 Thorpe, Federal and State Constitutions

[92] See text, *supra*, at nn. 16–17.

[93] 4 Thorpe, Federal and State Constitutions (1909), at 2444.

in the sea,[94] the 1691 charter specifically provided that all English subjects "shall have full and free power and Libertie to continue and use their said Trade of Fishing upon the said Coasts in any of the seas thereunto adjoining . . . where they have been wont to fish . . . ." [95] This does not appear, however, to have been interpreted as restricting the colonies' rights to regulate fishing within their boundaries or along their coasts, for New Hampshire enacted laws for regulating that trade prior to the royal decree,[96] and, following the Revolution, Massachusetts exercised regulatory power over coastal fishing in Maine, forbidding the taking of mackerel, for example.[97]

But whatever jurisdiction was exercised by regulatory control of the coastal fishing, it could not have been based upon actual ownership of those waters. The better view is that such jurisdiction was naturally derived from the limited protective jurisdiction that the Crown exercised in the area of its coastlines. For despite earlier Stuart claims to the contrary, the Crown no longer claimed to own the coastal seas of its dominion, not even the seas adjacent to the shores of England itself.[98] Thus, the Crown did not make grants of the coastal seas in the New World to the council at Plymouth, or to the council's

[94] 3 Thorpe, Federal and State Constitutions (1909), at 1626.

[95] *Id.*, at 1885.

[96] See Act of May 14, 1718, c. 32, 2 Laws of New Hampshire; see also Act of June 1, 1687, c. 12, Laws of New Hampshire (during the "Dominion of New England").

[97] Williamson, *supra*, vol. 2, at 596–597. For a discussion of the negligible effect of these activities by the colonies upon any claimed property right in or dominion over the adjacent coastal seas, see Report of the Special Master, Albert B. Maris, in *United States* v. *Maine*, No. 35 Original (August 27, 1974) (hereinafter cited as Maris), at 5&-50. The Court has given its approval to the Special Master's Report and his interpretation of the history of offshore boundaries and territorial seas along the Atalntic coast. See *United States* v. *Maine*, 420 U. S. 515 (1975).

[98] See Maris, *supra*, at 40–47.

successors—the colonies of Maine and New Hampshire. This fact is also evident from the words of the charters themselves. The charters specify boundaries that proceed from "sea to sea," or "along the sea coasts," [99] or describe grants of mainland and islands without mentioning adjacent or intervening seas.[100] Logically then, neither the Commissioners in their recommendations nor the King in his subsequent decree proposed to determine a boundary in the sea between Maine and New Hampshire that would apportion to each of the colonies property interest in the coastal or marginal sea. Cf. *United States* v. *Maine*, 420 U. S. 515 (1975); *United States* v. *California*, 332 U. S. 19 (1947).

Although the King did not delimit a Maine-New Hampshire boundary in the sea, the 1740 decree is not meaningless and irrelevant to the resolution of the question of what line shall connect the boundaries that were defined in the Mouth of the Piscataqua Harbor and Gosport Harbor. Rather the use of the phrase, "the Dividing Line," in the decree ineluctably leads to the conclusion that the same single line was intended to demarcate the territory of the provinces on the mainland and to project seaward to divide the Isles of Shoals as well. The decree specifies that "the Dividing Line shall pass up through" Piscataqua Harbor and "the Dividing Line shall part the Isles of Shoals" as well. It says "*the* Dividing Line" in both contexts, not "the first" and "the second" lines, nor even "a" line in one harbor and "a" second one in the other. Further it seems quite unlikely that anything other than a straight line could

[99] See, *e. g.*, text, *supra*, at nn. 15 and 33.

[100] See Maris, *supra*, at 47–48. Faced with similar circumstances requiring a review of English law, the Special Master found persuasive the formulation that "while the coastal state might exercise protective jurisdiction over the intervening seas, it had no right of sovereignty over those seas, its property right involving only the islands, not the seas." *Id.*, at 50–51 (footnote omitted).

have been meant. As pointed out in Part 3,[101] New Hampshire argued in 1737 that a straight line drawn from Piscataqua Harbor would part the Isles of Shoals and the Commissioners appear to have accepted this view. The maps of that period hardly displayed mathematical accuracy, and it is reasonable to suppose that the Commissioners selected the simplest way of connecting the two points in the harbors that they had in mind. The proper line is therefore a straight line bearing approximately 140° clockwise from True North, between the midpoint of the closing line of Gosport Harbor and the point where the "Middle of the River" crosses the closing line of the "Mouth of the Piscataqua Harbor." This is the line that was projected in the 1740 decree. Although it did not determine an appropriate boundary in the sea in 1740, other considerations contribute to its authority as the appropriate boundary for resolution of this dispute.

5. Lateral Offshore Boundary Between the States.

Having established the application of the 1740 decree to the boundary between Maine and New Hampshire in the mouth of the Piscataqua River and the middle of Gosport Harbor, it remains to determine exactly what line is to connect those two points and serve as the lateral offshore boundary between the two States in the disputed lobster waters. As has been shown, the 1740 decree could not have divided the waters in a manner that would fix the property interests in the sea and sea bed between the mainland and the Isles of Shoals. It was not until the Submerged Lands Act of May 22, 1953, 67 Stat. 29, that title to those waters and offshore resources passed to the States.[102] By that Act, Congress confirmed to and vested in the coastal States the seabed and the resources of the territorial sea within three geo-

[101] See text, *supra*, at nn. 52–54.

[102] See *United States* v. *Maine*, 420 U. S. 515 (1975), and see also Maris, *supra*, at 79–80.

graphical miles of their respective coastlines. Prior to the Act, the States at most exercised regulatory jurisdiction over coastal waters between the mainland and the Isles of Shoals. Any boundary that existed merely delimited the areas of each State's jurisdiction, and could not define each State's property interest. Resolution of this case will be the first determinative settlement of the offshore maritime boundary between the two.

It is the conclusion of the Special Master that the straight line projected by the 1740 decree, connecting the midpoint of the closing line of the Gosport Harbor with the point where the geographical middle of the Piscataqua River crosses the closing line of the mouth of the Piscataqua Harbor, is the most appropriate boundary line between Maine and New Hampshire in the disputed waters. This line alone comports with the history, usage, and special circumstances of the area, as well as affording an equitable distribution of, and access to, the area.

Initially, it is essential to confront the claim of the *amici curiae* that, since the 1740 decree did not divide the waters between the Isles of Shoals and Piscataqua Harbor, "the *usage* of people on both sides of the territory to be divided should be the primary consideration in fixing the location of the line." [103] This argument, though superficially intriguing, fails to consider the obvious distinction between seabed ownership and the exercise of regulatory jurisdiction over coastal waters within state boundaries after 1776. As *United States* v. *Maine*, *supra*, has recently reaffirmed, the former is a paramount right of the Federal Government. The latter, however, remains a right of the State so long as it does not unduly burden interstate commerce. In *Corsa* v. *Tawes*, 149 F. Supp. 771 (Md.), aff'd, 355 U. S. 37 (1957), where a Maryland fishing statute was attacked as unconstitutional, the three-judge district court stated:

> "Since the decision in *Manchester* v. *Commonwealth of Massachusetts*, 139 U. S. 240 (1890), it has been beyond dispute that in the absence of conflicting congressional legislation under the commerce clause, regulation of the coastal fisheries is within the police power of the individual states under the doctrine of *Cooley* v. *Board of Wardens of Port of Philadelphia*, 12 How. 298 (53 U. S., 1852)." 149 F. Supp., at 773.

See also *Skiriotes* v. *Florida*, 313 U. S. 69 (1940).

The usage that should be first considered is that usage made by the States themselves in the exercise of this regulatory jurisdiction.

Of more significance, the Court has recommended that for purposes of interpreting the Submerged Lands Act "the line marking the seaward limit of inland waters" should be drawn for each State in accordance with the definitions of the Convention on the Territorial Sea and the Contiguous Zone, 15 U. S. T. (pt. 2) 1606, T. I. A. S. No. 5639 (1964). See *United States* v. *Louisiana*, 394 U. S. 11 (1969), at 35–36. If an analogous recommendation were to be made, urging that the Convention be used to determine the boundary that is the subject of this dispute, the offshore maritime boundary between Maine and New Hampshire would be far different from the one that the Special Master proposes. The Convention in Article 12 calls for a median line based upon the equidistance principle when determining the boundary between the territorial seas of States with opposite or adjacent coasts. In this case, Maine and New Hampshire's territories include the Isles of Shoals. This presents the difficult problem of drawing a median line that considers the equidistant points not only from their adjacent coasts but also from the opposite and facing shores of the Isles of Shoals as well. Such a median line would be difficult to draw [104] and nearly impossible to police, but it would settle the boundary definitively.

[103] Brief of *Amici Curiae* (filed Jan. 17, 1975), at 27–28.

[104] See Boggs, *supra*, n. 84, at 190, fig. 26, for an explanation of how such a line would be drawn under the Convention.

Several factors, however, militate against this resolution of the boundary. First, the parties agree that a median line would be "extremely inconvenient and unworkable." Second, the Court in the *California* and *Louisiana* cases, and even in the recent *Maine* case, *supra*, decided different questions than are here involved. Those cases dealt principally with the claims of the coastal States *vis a vis* the Federal Government over ownership of the territorial seas and seabed outside of the three-mile marginal sea. Here, the contest is between two States over seas and seabeds granted to them by the Submerged Lands Act and within the three-mile marginal sea. The Court might properly determine that this case is distinguishable from the earlier ones on this basis and decide that application of the Convention in this case is inappropriate. Third, one of the reasons for determining this boundary is to facilitate in the policing of each State's territorial waters under its respective lobster regulations. Yet, as the parties stipulated about the median line suggested by the Convention: "[S]uch a line . . . would be extremely inconvenient and unworkable from the points of view of law enforcement, navigation and ease of location." [135] Fourth, the Convention itself provides:

> "The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way that is at variance with this provision." Convention, *supra*, at 1610.

Finally, the presence of offshore islands is one of the special circumstances which justifies deviating from a true median line.[136] See A. L. Shalowitz, Shore and Sea Boundaries, Vol. 1, at 232 n. 55.

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[135] See text, *supra*, at nn. 1–2.

[136] "Special configurations of a coast, the presence of islands, the existence of special mineral or fishery rights in one of the states, or the presence of a navigable channel are among the special circumstances which might justify a deviation from a median line." Shalowitz, *supra*, at 232 n. 55.

Accordingly, it is appropriate, even by the Convention's own terms, to disregard the median line based upon the equidistance principle when "historic title or other special circumstances" require it.

Turning then to this case, although historic title to the seas between the mainland and the Isles of Shoals never was held by either Maine or New Hampshire, the "special circumstances" of their coastline, the existence of the Isles of Shoals, and their agreement on the decree of 1740 as the delimitation of their other boundaries direct the adoption of the line proposed by the Special Master. Only the straight line projected between the two harbors in 1740, believed by the Commissioners and the King to divide the Isles of Shoals, satisfies the requirements of the "special circumstances" of this case.

It is appropriate to enumerate these historical and "special circumstances" that direct the adoption of the 1740 projected line. The most significant of these is the fact that both Maine and New Hampshire have accepted the 1740 decree as the delimitation of their other boundaries. This acceptance includes the determination by both States that the 1740 decree fixed the boundaries in both the Piscataqua and Gosport Harbors. Report of New Hampshire-Maine Boundary Commission (1828). Both legislatures, 9 N. H. Laws 943 and Maine Resolves of 1829, at 29, and at least one of the state courts, *State* v. *Wagner*, 61 Maine 190 (1873), have approved of the 1828 Commission's determination in this regard.

The principal "special circumstance" is suggested by the topography of the Maine-New Hampshire coast. The proposed boundary of the Special Master is a line that is nearly perpendicular to the general direction of that coast from Cape Neddick to Great Boar's Head. It is a matter of simple geometry that a perpendicular

line will divide an area, such as this one, more equitably because essentially it divides the surface area into two equal portions. Thus the historicity of the points in the two harbors and the equity of a line that runs perpendicular to the general direction of the coast both support the adoption of the straight line that connects the points in the two harbors.

An additional relevant circumstance is evident from the usage that the States have made of the waters between the Piscataqua and Gosport Harbor. Although the Crown did not claim for itself or grant property interests in the coastal seas along Maine and New Hampshire, it did have authority to exercise its protective police powers in these waters, a function which it in part delegated to the colonies. This delegated power included the regulation of their citizens' fishing, both in the marginal sea as well as in inland coastal waters.[107] It no doubt included policing of the waters with regard to piracy and repelling enemies. When the colonies declared their independence, these protective activities continued to be conducted by the States for State purposes, but they had no property interest ramifications.[108] Until this dispute arose, however, there was apparently no need to delimit between Maine and New Hampshire the respective areas of this police function. It is the view of the Special Master that, if the occasion had arisen, the line which logically would have been chosen would be the line projected through the waters by the 1740 decree of the King. It was from the Crown that this police responsibility derived and it was that line upon which the Crown relied in the decree of 1740 to divide the territory on the mainland and in the Isles of Shoals between the colonies.

Other relevant circumstances which direct the adoption of the boundary proposed by the Special Master are

[107] See text, *supra*, at nn. 96–97; see also Maris, *supra*, at 56–65.
[108] See text, *supra*, at nn. 97–98.

summarized in an observation of the equity and utility of the proposed line. First, the line closely approximates the one agreed upon by the two States in their proposed consent decree. Second, because it is a straight line, the proposed boundary affords ease of demarcation and enforcement. It is interesting to note that the line appears to divide nearly equally the best locations for lobster fishing in the waters, at least as those locations have been marked in the brief of *amici curiae*.[109] Third, the proposed line comports with a combined consideration of the history and usage of the area by the two States and an equitable distribution of the area based upon that history and usage.

Finally, the proposed line is the best of all the alternatives. In making this observation it is necessary to give some consideration to other possible lines which the parties and *amici* have at various times espoused, not as interpretations of the 1740 decree, but as boundaries resulting from usage or acquiescence by operation of law. At one extreme is New Hampshire's original theory, now defended by *amici*, that the so-called "lights on range" line—being an extension to the mouth of Gosport Harbor of a line connecting Fort Point Light and Whaleback Light—must be considered the boundary because New Hampshire lobstermen have been accustomed to determine the approximate location of the boundary by making visual reference to that line.[110] It is argued that the long practice of those who use the area must be given primary consideration, quoting *The Grisbadarna Case*, Scott, Hague Court Reports 121 (1916), as follows:

> "[I]t is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible." *Id.*, at 130.

[109] See Brief of *Amici Curiae* (filed Jan. 17., 1975), at Appendix A.
[110] Complaint of New Hampshire (filed June 6, 1973), at 4.

Yet, as New Hampshire now points out in a subsequent brief,[111] it appears that it was the lengthy, expensive, and unprotested conduct of the central government of Sweden in measuring and placing a lightboat in the challenged region which established a prescriptive line. See 4 Am. J. Int. L. 226, 234–235 (1910). Moreover, in The Case Concerning the Temple of Preah Vihear (*Cambodia* v. *Thailand*), 1962 I. C. J. Rep. 6; 56 Am. J. Int. L. 1033, which *amici* relies on, the court specifically rejected an argument made by Thailand concerning acquiescence based on "local acts" which were not merely acts of private citizens but "the acts of local and provincial authorities." 56 Am. J. Int. L., at 1046.

The conduct relied upon by *Amici* to establish the "lights on range" line as the boundary by acquiescence, long usage, and prescription is simply not the sort of official government conduct which has been held to trigger the invocation of these equitable doctrines. Neither is there merit to Maine's original claim that a line appearing on a U. S. Geological Survey map, Maine-New Hampshire 1 York Quadrangle, Edition of 1920, No. 4300–W 7030/15, has been established as the state boundary by long usage. In its pretrial submission, Maine drew attention to the appearance of this "dog-leg" line on U. S. Geological Survey and U. S. Army Map Service maps in the years 1918, 1920, 1933, 1944, 1949, and 1956, and also on several maps published by various New Hampshire state agencies, such as the Board of Fish and Game Commissioners.[112] Maine argued that:

> "The repetitive publication of that line by such a highly respected, official map agency as the U. S. Geological Survey, without protest by New Hampshire for a period of more than 50 years reflects an implicit acceptance of that line by New Hampshire." [113]

[111] Brief in support of Proposed Consent Decree and In Reply to *Amici Curiae* (filed Feb. 18, 1975), at 4.

[112] Pretrial Memorandum of Maine (filed April 19, 1974), at 18–19.

In evaluating this contention, it is important to look first at the data upon which the U. S. Geological Survey map is based. One is immediately struck by its wholly arbitrary nature, an impression which is strengthened by a letter from the Acting Director of the U. S. Geological Survey, dated June 10, 1966, and addressed to Congressman James Cleveland of New Hampshire, in which this surprising revelation is made:

> "In reviewing topographic quadrangle maps of the area in question, we found no evidence to prove that the Maine-New Hampshire boundary from the mouth of Piscataqua River to the Isles of Shoals is a straight line. Neither have we found any proof that it is a curving line although it is so shown on the now out-of-print special Portsmouth 1:62,500-scale topographic map prepared by the Geological Survey in 1916–17. It was hoped that the original field survey sheets for this map, stored in the National Archives, would provide some documentation as to why the curving boundary was shown. Unfortunately, none was found. Accordingly, we can only conclude that personal interpretations on the part of the field engineer, possibly supported by local opinion, was the reason for the line being shown in that manner.
>
> "On the 1:24,000 scale topographic quadrangle maps of the area, prepared in 1944 by the U. S. Coast and Geodetic Survey for the Army Map Service, the boundary is shown in this same general location although it is more curving in some parts on the 1916–17 map. We believe these minor differences indicate that definite information regarding the boundary location was not available during either survey." [114]

[113] *Id.*, at 19.

[114] Letter from Arthur A. Baker, Acting Director, Geological Sur-

The United States Court of Appeals for the Ninth Circuit once held that:

> "We are unable to agree with the trial court as to the effect which should be given to the hydrographic maps of the United States Coast and Geodetic Survey as evidence in this case. We think the maps should be given full credence, and should be taken as absolutely establishing the truth of all that they purport to show." *United States* v. *Romaine*, 255 F. 253, 254 (CA9 1919).

This respect, even if applicable to Geological Survey maps, does not, however, follow where the aspect of the map in dispute is a boundary, for that involves legal and historical matters quite outside the expertise of such agencies. The Special Master concludes that the mere appearance on a map of a boundary line—grounded only in the imagination of some nameless draftsman—is not enough to raise prescriptive rights in one State. This is nonetheless true where such a line appears on several maps published by New Hampshire agencies, for these are minor and fairly recent acts which simply do not rise to the heights necessary to call into play the doctrine of acquiescence. Moreover, it should be noted that there are maps of greater age in which the state boundary is portrayed as a *straight* line from Portsmouth Harbor to Gosport Harbor. See Chace, "Map of Rockingham County, New Hampshire" (1857); Rand, McNally & Co., "Map of New Hampshire" (1895); *id.*, editions of 1898 and 1899; Geo. Walker & Co., "Map of New Hampshire" (1893).[115]

It is the conclusion of the Special Master that no further evidentiary hearings on this dispute are necessary

vey, U. S. Department of the Interior, dated June 10, 1966; printed as Appendix A, Rebuttal Brief by the Plaintiff in Support of Its Motion for Preliminary Injunction (filed June 21, 1973).

[115] These maps are available at the Geography and Map Division, Library of Congress.

to examine any claim of acquiescence or prescription, since the issues originally raised by the parties and currently raised by *amici* are wholly insubstantial, even if the allegations regarding the "lights-on-range" line and the U. S. Geological Survey Map were proved. Because the lateral marine boundary between Maine and New Hampshire extending from the Piscataqua River to the Isles of Shoals should be that one suggested by the 1740 decree, the boundary is hereby found to be as set forth in Part 4 of this report.[116]

Respectfully submitted,

TOM C. CLARK,
Special Master.

October 8, 1975

[116] Of course, provision should be made for marking the boundary. The Special Master approves of the language of Paragraph 13 of the consent decree for that purpose:

"(13) Provision shall be made for installation and maintenance of suitable markers and/or navigation aids and devices to locate and mark the boundary as settled, subject to any applicable federal regulations, the costs of which shall be shared equally by the two States. The parties hereto shall within 180 days after the entry of this judgment file a stipulation with this Court indicating the points and locations at which such markers and/or navigation aids and devices are to be located and the kinds of markers and/or navigation aids and devices agreed upon. . . ."